



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2010

Mr. Jeffrey L. Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-14132

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 393824.

The City of The Colony (the "city"), which you represent, received a request for names and addresses of all new city utility customers from April 1, 2010, to the date of the request. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You claim the customer names and addresses are excepted from disclosure under section 552.101 because the public release of the information is inconsistent with the mandate in part 681 of title 16 of the Code of Federal Regulations (the "Red Flags Rules"). *See* 16 C.F.R. pt. 681 (2009); *see also* 15 U.S.C. § 1681m(e)(1)(A), (B) (requiring federal banking agencies, National Credit Union Administration, and Federal Trade Commission (the "commission") to establish guidelines regarding identity theft with respect to account holders and to prescribe regulations requiring financial institutions and creditors to establish reasonable policies and procedures for implementing those guidelines). Section 681.1 requires financial institutions and creditors that are subject to the commission's enforcement of the Fair Credit Reporting Act and that offer or maintain "covered accounts" to develop

and implement a written identity theft prevention program.¹ 16 C.F.R. § 681.1(a), (d)(1). The purpose of such a program is to “to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.” *See id.* pt. 681, App. A (providing guidelines for financial institutions and creditors to formulate and maintain programs satisfying requirements of section 681.1). For purposes of the Red Flags Rules, a “creditor” has the same meaning as in section 1681a(r)(5) of title 15 of the United States Code and includes a utility company. *Id.* § 681.1(b)(5); *see also* 15 U.S.C. §§ 1681a(r)(5) (“creditor” has same meanings as in 15 U.S.C. § 1691a), 1691a(e) (defining “creditor” as any person who regularly extends, renews, or continues credit). A “covered account” means an account which “a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account[.]” 16 C.F.R. § 681.1(b)(3)(i).

You state the city has adopted by resolution an identity theft prevention program pursuant to the Red Flags Rules. According to the resolution, the program “shall govern the procedures and strategies for the prevention of identity theft for the City’s Utility Department in compliance with federal law.” This program, a copy of which you have provided this office, defines “identifying information” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific person,” including an individual’s name or address. However, you have not directed our attention to any provision in the program or the Red Flags Rules that makes confidential the information at issue. *See* Gov’t Code § 552.101 (excepting information made confidential by law). Furthermore, you have not explained how section 681.1 provides the city with the authority to make any information confidential by resolution. A governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (local ordinance conflicting with or inconsistent with state legislation not permissible). After considering your arguments and reviewing the city’s program and the information at issue, we conclude you have not demonstrated how the Red Flags Rules or the program makes the submitted information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Therefore, we conclude the city may not

¹Although you cite to section 681.2 of title 16 of the Code of Federal Regulations, we note section 681.1 is the correct section for the substance of your argument.

withhold any information under section 552.101 of the Government Code in conjunction with either the Red Flags Rules or the city's identity theft prevention program.

Section 552.101 also encompasses section 182.052 of the Utilities Code, which provides in relevant part:

- (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.
- (b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) includes an individual's address, telephone number, or social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Water service is included in the scope of utility services covered by section 182.052. *Id.* § 182.051(3). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054. Moreover, because section 182.052 is intended to protect the safety and privacy of individual customers, this statute is applicable only to information pertaining to natural persons, and does not protect information relating to business, governmental, and other artificial entities. *See* ORD 625 at 4-5 (in context of Util. Code § 182.051(4), "individual" means only natural persons and does not include artificial entities).

In this instance, you represent that none of the exceptions listed in section 182.054 is applicable. You do not inform us whether any of the individuals whose information is at issue timely requested confidentiality under section 182.052. Accordingly, to the extent any of the customers at issue made a written request for confidentiality prior to the city's receipt of this request for information, the city must withhold their addresses from the responsive information. *See* ORD 625 at 7 (character of requested information as public or not public must be determined at time request for information is made). To the extent any individual whose information is at issue did not make a written confidentiality request prior to the city's receipt of this request, the city must release that individual's address.

You raise section 552.136 of the Government Code for the utility account numbers you have marked. Section 552.136 provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected,

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). We agree city utility account numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the customer utility account numbers you have marked under section 552.136 of the Government Code.

In summary, to the extent any of the customers at issue made a written request for confidentiality prior to the city’s receipt of this request for information, the city must withhold their addresses, which you have marked, under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. The city must withhold the utility account numbers you have marked under section 552.136 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 393824

Enc. Submitted documents

c: Requestor
(w/o enclosures)